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LEGITIMACY &  
CITIZENSHIP  
in the Arab world  
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# THE SYRIAN CONSTITUTIONAL COURT

## HOW CAN IT BECOME A GUARANTOR OF LEGITIMACY AND CITIZENSHIP?

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JULY 2020



This paper presents an abridgement of a book by the author titled [‘The Constitutional Court in Syria’s Constitutions: A Comparative, Historical and Legal Reading’](#), published in Arabic by the Legitimacy and Citizenship in the Arab World programme. This programme is part of the Conflict and Civil Society Research Unit at the London School of Economics (LSE).

**This publication is also available in Arabic under the title:**

المحكمة الدستورية السورية: إشكالياتها وكيف يمكن أن تكون ضامنة لمبادئ الشرعية والمواطنة

This publication was made possible by a grant from **Carnegie Corporation of New York**. The statements made and views expressed are solely the responsibility of the author.

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**Cover photo:** Pictures of two stamps issued in Syria in 1950 to celebrate the first Syrian constitution after independence, which was approved on September 5, 1950 by an elected constituent assembly. This constitution is the first Syrian constitution to establish an actual constitutional court.

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## Legitimacy and Citizenship in the Arab World

Legitimacy and Citizenship in the Arab World is a project within the Civil Society and Conflict Research Unit at the London School of Economics. The project looks into the gap in understanding legitimacy between external policy-makers, who are more likely to hold a procedural notion of legitimacy, and local citizens who have a more substantive conception, based on their lived experiences. Moreover, external policy-makers often assume that conflicts in the Arab world are caused by deep-seated divisions usually expressed in terms of exclusive identities. People on the ground see the conflict differently and often perceive it as collusion against the general populace.

The project aims to bridge these gaps and advance our understanding of political legitimacy, thus improving policymaking and constitution writing to achieve sustainable peace and state-building in the Arab world. It also investigates how exclusive identities are deliberately constructed by ruling elites as a way of deflecting democratic demands and hindering the prospects of substantive legitimacy.

While Syria is the project's focus, a comparative analysis is also being conducted to draw relevant lessons learned from post-war Lebanon and Iraq where ethno-sectarian power-sharing agreements were the basis of peacebuilding processes and constitution writing.

The research paper series comprises papers, published sequentially, concerned with the study of pivotal issues in democracy-building, legitimacy-building and identity formation in Syria from a constitutional perspective. These issues, and how they have been addressed in successive Syrian constitutions, are examined in a historical study, from the first constitution drafted in 1920 up until the present day. The developments and deliberations surrounding them are also examined, as per their historical context. A comparative analysis of how other countries' constitutions addressed these issues is also put forward, before presenting solutions and proposals for how they can be engaged with at the current time.

The project is carried out by a team of Syrian and Lebanese researchers and experts, led by Dr Rim Turkmani.

For more information visit the project's website: <http://dustoor.org/>

## Table of Contents

1	Introduction	3
2	Composition of the Court	6
2.1	Number of Judges	6
2.2	Appointments of Judges	8
2.3	Conditions of Membership	8
2.4	Term of Office and Possibility of Renewal	10
2.5	Dismissal of Judges	11
3	Jurisidication of the Court and Access to the Court	16
3.1	Syria's Constitutions Prior to 2012	16
3.2	Syria's Current Constitutions of 2012	18
3.3	Gaps in Jurisidication Compared to International Standards and Practices	22
4	Problems and Proposed Solutions	28
4.1	Independence of the Court	29
4.2	Capacity of the Court to Exercise its Jurisidication	31
4.3	Ability of Individuals to Access the Court	34
4.4	Consolidating Powers to Strengthen Constitutional Control	35
5	Conclusion	37

# 1 Introduction

Constitutional courts play a crucial and impactful role in a country's legal system. They are charged with upholding compliance with the country's constitutional provisions and guaranteeing the application of the constitution. This court is the foremost legal and constitutional authority, and may not be overridden or contravened. It is, moreover, the final recourse for those whose constitutional rights have been violated, when all other means of litigation fail to provide redress.

Syria's constitutional court has witnessed a number of developments over the last century.<sup>1</sup> It was initially known as the Supreme Court, and was an optional court which could be convened as needed. Its role was limited to holding political figures and top state officials to account if the need arose. Syria's draft constitution of 1920 kept this model in place, as did the country's first official constitution introduced in 1930. It was only with the introduction of the 1950 Constitution that this court was granted constitutional control powers and thus began to take shape as a constitutional court. With the exception of a few amendments, the provisions of the 1950 Constitution were reproduced for those of 1953 and 1962, but mention of the court was then wholly absent from several subsequent iterations, until that of 1973. It was this constitution that was the first in the country's history to use the term 'Supreme Constitutional Court,' a term preserved in the current constitution introduced in 2012.

This paper presents an examination of how Syria's constitutional court could truly act as the recourse for any citizen whose constitutional rights have been contravened, where redress through the prevailing legal system has failed. It looks, too, into how this court could come to act as the authority which guarantees the application of the constitution's provisions, in practice and not just in form: that is to say, to ensure that well-formed provisions and elegant phrasing, found in constitutions across the world, are transformed into tangible practices and concrete actions extending to all citizens. Further to this, the paper will look into how the court could play a part in effective nation-building, in which justice, freedom, dignity and equality prevail, for all citizens. This would necessarily entail genuine citizenship, without exception, exclusion or discrimination.

An analysis of the extent to which Syria's constitutional court has been able, since its inception, to perform the role intended for such courts also forms part of this paper. This role includes: conducting necessary constitutional control (also known as constitutional oversight or review); defending individuals' constitutional rights; and guaranteeing the compatibility of all conduct attributed to the different branches of the state with the provisions of the constitution, the country's supreme law. The paper will also look into the current deficiencies of the court and the challenges it faces, those which should be addressed and resolved in any upcoming constitutional process.

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<sup>1</sup> The presence of the Supreme / Constitutional Court has been sporadic over the different manifestations of Syria's constitutions. It was stipulated in the draft constitution of 1920, and also in the constitutions introduced in the following years: 1930, 1950, 1953, 1962, 1973 and 2012. However, it was absent from a number of other constitutions, namely the constitution of the union with Egypt in 1958, and the constitutions introduced in 1961, 1964, 1969 and 1971. There were also times, moreover, where this court was stipulated in the constitution, but was effectively absent from the legal system, given its restricted powers; in such times, it exercised a far smaller role than what it was supposed to.

Examination of this topic raises a number of key questions. Has the course taken by the court – whether in terms of how it was set up, its powers or the way it is accessed – been in accordance with prevailing international standards and practices? Has the approach taken by Syrian constitutional lawmakers, throughout their history, towards this court had an impact on its capacity to perform its required role? Is there a need to introduce constitutional amendments pertaining to this court, and would this be related to the establishment and composition of the court, its jurisdiction, or its accessibility? Are there international practices, applicable and relevant to Syria, which can be benefitted from and relied upon in order to introduce necessary amendments to Syria’s constitutional court system?

This topic is increasingly significant given the lack of clarity surrounding this court. Amidst all the debate and controversy which has surrounded the constitution since the launch of the Syrian Constitutional Committee, which hit stumbling blocks after its first round of talks in Geneva on 30 October 2019, there has been noticeably little discussion of the constitutional court. This is a particularly conspicuous absence given the magnitude of the role and scope of this court, and the sensitive nature of its jurisdiction.

While the constitutional court, in its current form, appears far removed from the concerns and aspirations of ordinary Syrians, it remains true that if the court was able to exercise the role it is supposed to, it could be much more relevant to people’s lives and the protection of their rights than they may believe. For among the popular grievances in the country, many relate to unequitable or unjust legislation that causes them detriment, legislation which is in direct contravention of the constitution. Correcting this goes to the heart of the jurisdiction of the constitutional court, since ruling on whether laws are unconstitutional forms the primary basis for its existence and establishment.

While one of the most prominent criticisms levelled at the current court is the inability of individuals to directly access it, an in-depth analysis reveals many other layers of concern. This paper aims to bring renewed attention to the Syria’s constitutional court, examining the minutiae of its functioning and highlighting the potential of this court both in the lives of individuals and in the state. It also seeks to highlight how the formation and composition of the court impacts its performance, and how procedural issues which are not normally at the centre of discussion, such as how judges are appointed, their term of office and renewability of this term, can impact the entire functionality of the court, by threatening its independence and capacity to exercise its subject-matter jurisdiction. This paper also puts forward detailed recommendations for amending relevant constitutional articles and court laws.

In terms of methodology, this paper will take a comparative, historical and analytical approach. All provisions relevant to the The Syrian Constitutional Court throughout its history will be examined, whether those found in the country’s successive constitutions or in court laws. These provisions will be analysed with a critical lens, focusing on what should exist rather than what is currently in place, while also comparing them to countries in the Arab world and further afield. Finally, we will propose recommendations by which the capacity of Syria’s constitutional court may be advanced, enabling it to perform its required role, that which is expected of similar courts across the world.

## 2 Composition of the Court

An examination of how constitutions have been drawn up, whether in Syria or elsewhere, gives us further indication as to the significance surrounding constitutional courts. By looking at the discussions and deliberations surrounding their composition, and the resultant provisions regulating them, we can see this process as something of a legal, constitutional and political battle, the outcomes of which are an early determinant for the court's chances for success or failure. This is because the way this constitutional body is designed ultimately reflects its credibility, independence, impartiality, and overall ability to achieve its desired objectives and take on the demands and responsibilities granted to it by the constitution and relevant legislation. As a result, the way the court is composed has the potential, from the start, to either strengthen trust in the court or – if particular principles, standards and good practices are not observed – erode this trust entirely.

This section examines five key issues with regard to the court's composition: the number of judges sitting on the court; the mechanism by which they are selected; the conditions of membership in the court; the length of membership and capacity for renewal; and the dismissal of judges.

### 2.1 Number of Judges

The 1920 draft constitution stipulated there be a total of sixteen judges on the Supreme Court, the 1930 Constitution decreased the number to fifteen, and the 1950 Constitution reduced this cohort still further to just seven judges. This latter decision was the result of heated debates in the Constituent Assembly, the body in charge of drafting the 1950 Constitution. The constitutions introduced in 1953 and 1963 maintained a cohort of seven judges, while the 1973 Constitution, the first to employ the term 'Constitutional Court' rather than 'Supreme Court', reduced the number of judges sitting on the court to just five.

These constitutions thus set a fixed number of judges on the Supreme Court, or Constitutional Court, without permitting the appointing authority to increase or decrease this number should this be required. The 2012 Constitution, however, employed a different approach; rather than setting a fixed number, it stipulated a *minimum* number of judges only, the provision stating the court should comprise 'at least seven judges.' Such a provision allows for the number of judges to be increased as the need arises, as per the demands and scope of the business of the court. Constitutional lawmakers have hereby granted the country's President, who is the appointing authority, the power to increase the number of members of the court as he sees fit.

Two laws were later issued to regulate court affairs; the first was Decree 35/2012, which stipulated that the Supreme Constitutional Court be made up of seven members, of whom one is the Court President, with the President of the Republic able to increase this number by decree. However, this text was later amended by the 2014 Court Law, currently in place, which stipulated that the court be made up of eleven members, of whom one is

the Court President.<sup>2</sup>

This current court law does not include the option for the President to increase the number by decree, as was the case in the 2012 law. However, upon examination, we have found nothing to legally prevent an increase or decrease of this number, as long as it does not go under seven. For even though the current court law does not include this stipulation, Article 141 of the 2012 Constitution, the highest law in the country, does in fact permit this.

A review of various international standards and constitutions shows that the number of judges on constitutional courts varies from country to country, reflecting differences in country and population size, the role of the court, and the nature of the mandate assigned to it. The following extracts are taken from various countries' constitutions, including Arab and non-Arab countries:

- **Spain:** The Constitutional Court shall consist of twelve members.
- **Portugal:** The Constitutional Court shall be composed of thirteen judges.
- **Turkey:** The Constitutional Court shall be composed of fifteen members.
- **France:** The Constitutional Council shall comprise nine members ... In addition to the nine members provided for above, former Presidents of the Republic shall be ex officio life members of the Constitutional Council.
- **Morocco:** The Constitutional Court is composed of twelve members.
- **Tunisia:** The Constitutional Court is composed of twelve members.
- **Kuwait:** The Constitutional Court is composed of five councillors.

The majority of the world's constitutions, and likewise the laws governing constitutional courts and councils, contain clear provisions setting a specific, fixed number of judges, which cannot be altered. In the absence of strict provisions stipulating this number, there is a risk that the executive, or whichever authority is in charge of appointments, would be able to increase or decrease the number for a particular benefit. This could be guaranteeing a particular majority, introducing new judges who have a particular bias, or getting rid of 'undesirable' figures from the court. This compromises the overall independence and impartiality of the court, erodes public trust in the court and ultimately undermines the purpose of its establishment.<sup>3</sup>

A review and analysis of Syria's constitutional provisions on this issue, and a comparison

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2 Jamila al-Sharbaji, *daur al-maḥkamah ad-dustūrīyah al-'ulyah fī ar-raqābah 'ala dustūrīyat al-qawānīn fī al-jamhūrīyah al-'arabīyah as-sūrīyah bayn dustūrayy 1973 wa 2012*, Damascus University Journal of Economic and Legal Sciences, Vol. 29 No. 3, 2013, p. 120

3 *Constitutional Review in New Democracies*, Briefing Paper, Center for Constitutional Transitions at NYU Law, September 2013



with other countries' constitution thus reveals a disparity. By not precisely defining the number of constitutional court judges and setting a minimum only, this provision in the 2012 Constitution is found to be out of step with the approaches adopted by the majority of constitutions around the world, and in-force constitutional court laws, which have strict and binding limitations on this element of the court.

## 2.2 Appointment of Judges

The way in which The Syrian Constitutional Court judges are appointed has changed several times over the country's history, reflecting changes in the political system governing different periods. The draft constitution of 1920 stipulated that half of the Supreme Court judges be appointed by the Senate, and the other half by the presidents of the Courts of Cassation, to be chosen through a drawing of lots by their relevant bodies. The 1930 Constitution maintained this level of independence; eight of the fifteen judges came from parliament, elected by members of parliament themselves at the start of each year, and the remaining seven were appointed yearly by the Court of Cassation, which selected judges of Syrian nationality who occupied the highest positions of the judicial hierarchy. In cases where this was equal between more than one judge, their time in the post was taken into account.

This process was superseded by the 1950 Constitution, which stipulated that Supreme Court judges be elected by parliament from a list of 14 names put forward by the President of the Republic. Those receiving an absolute majority of votes from the whole parliament were elected. This system was replicated for the constitutions of 1953 and 1962. However, the constitutions of 1973 and 2012 granted the President singular authority over the appointment of all judges to the constitutional court, including the appointment of the court's president. The President alone makes these appointments, without any other authority being included in this process. This is in sharp contrast to the majority of Syrian constitutions prior to 1973, and has been subject to significant criticism.

Looking now to international practices, a number of different methods and models are found to be in place. In countries such as Switzerland, Belgium and Germany, judges are elected solely by parliament; in Italy, of the 15 members in the Constitutional Court, five are elected by parliament, five are appointed by the judiciary from among the judges of the higher courts, and five are appointed by the President. In France, meanwhile, the Constitutional Council is made up of nine members; three are selected by the President, three by the President of the Senate, and three by the National Assembly. Former presidents are also made members of the French Constitutional Council by law.<sup>4</sup>

## 2.3 Conditions of Membership

The issue of membership of the court was touched upon only briefly by successive Syr-

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<sup>4</sup> See: Cecelia Goetz and Katherine Glenn Bass, *Constitutional Courts After the Arab Spring: Appointment Mechanisms and Relative Judicial Independence*, Center for Constitutional Transitions and International IDEA, NYU Law, 2014

ian constitutions, which employed broad statements and deferred deliberation over the details of these conditions to specific court laws, or to laws which pertain to the court. The draft constitution of 1920 did not detail conditions that Supreme Court judges had to meet, instead stipulating that half the judges of this court come from the Senate, and the other half comprise Courts of Cassation presidents. Accordingly, the former half would have to have met the conditions of the Senate, and the latter half would have to have met the conditions of being a president of a Court of Cassation. This was replicated in the 1930 Constitution, while the 1950 Constitution instead required that Supreme Court judges have appropriate qualifications to be eligible to assume the weight of this position, that they be in possession of advanced degrees and that they be at least forty years old. We have looked closely at these conditions, laid out in Law 57/1950, which goes into both the powers and staffing of the Supreme Court. The 1953 Constitution mandated that Supreme Court candidates be members of parliament, hold a law degree from the Syrian University or equivalent, be at least forty years of age, and have served as a judge, lawyer and/or university professor for at least ten years. As for the 1962 Constitution, it stipulated that Supreme Court judges must have sufficient qualifications to take on the weight of this position, that they be in possession of advanced degrees and be at least forty years of age.

However, the 1973 Constitution removed all conditions for membership to the Supreme Constitutional Court, simply stating that this would be regulated by law (Court Law 19/1973). The same approach was adopted by the 2012 Constitution, which also neglected to lay out the conditions for membership to the Supreme Constitutional Court, merely, as before, stipulating that this issue be regulated by law. Court law later determined that judges to this court must have Syrian nationality, hold no other nationality, meet general employment conditions, be at least forty years of age and no older than seventy-two, have a law degree from a Syrian university or equivalent, and have served as a judge, lawyer or teacher in a law faculty, for no less than 15 years.<sup>5</sup>

Comparing this to international constitutions and standards, fundamental principles regarding the independence of the judiciary establish a number of key conditions. These principles stipulate that those chosen to fill judicial posts must be:

Individuals of integrity and ability with appropriate training or qualifications in law. Any method of judicial selection shall safeguard against judicial appointments for improper motives. In the selection of judges, there shall be no discrimination against a person on the grounds of race, colour, sex, religion, political or other opinion, national or social origin, property, birth or status.<sup>6</sup>

These are conditions which can be observed in many constitutions across the world; our research shows that constitutional court laws in Tunisia and Morocco, for example, go

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5 Hasan Mustafa al-Bahri, *al-qaḍā' ad-dustūrī, dirāsah muqārinah*, First Edition 2017, p. 131

6 Basic Principles on the Independence of the Judiciary, Adopted by the Seventh United Nations Congress on the Prevention of Crime and the Treatment of Offenders held at Milan from 26 August to 6 September 1985 and endorsed by General Assembly resolutions 40/32 of 29 November 1985 and 40/146 of 13 December 1985

into greater detail about the conditions of appointment to the court, and the duties of the court judges. In contrast, the current Syrian constitution provides only general, broad principles, deferring to other laws for elaboration, and duties are given to these judges which are intended to be imposed upon judges appointed outside the constitutional court.

A further observation is that Syrian constitutional provisions and court laws do not contain any particular stipulation for women to be included or represented in the membership of the court. This is in contrast to a number of other Arab constitutions, such as in Tunisia, where it is expressly stated that the appointment of court judges should be carried out in pursuit of equality between women and men. It is important that this be redressed in Syria, where the present number of female constitutional court judges in 2020 is two out of the total of eleven judges sitting on the court today.

## 2.4 Term of Office and Possibility of Renewal

This issue, which on the face of it appears little more than form and procedure, is in fact a matter of utmost significance. It is directly linked to the guarantee of the court's independence, and the capacity of its judges to perform their duties with total impartiality, without being exposed to external pressures; this would be wholly undermined if their continuance in office was linked to a decision made by a separate authority.

Neither the draft constitution of 1920 nor the 1930 Constitution touched upon the issue of Supreme Court judges' terms of office or the renewability of their term. This is possibly because of the nature of the court at that time, since its only charge was to try certain public officials and it did not hold any other authority distinguishing the function of a constitutional court. However, this changed with the 1950 Constitution, which stated that: 'Members of the Supreme Court shall remain in this post for five years, with the possibility of re-election.' A later court law made clear that a judge could not remain on this court once over the age of 65. Thus, the 1950 Constitution, which was the first to give rise to a real constitutional court in Syria, having a mandate for constitutional control, established the principle of term renewability for this court's judges, without limiting the number of renewals, giving only an age limit of 65.

The constitutions of 1953 and 1962 retained the same norms as those from 1950, stipulating the members of the Supreme Court remain in their positions for five years, with the possibility of re-election. However, the 1973 Constitution reduced the judges' term of office, stipulating that 'The term of membership of the Supreme Constitutional Court shall be four years, subject to renewal.'

The current 2012 Constitution contains the same provision as that in the 1973 Constitution. The lawmaker thus authorises the President, who is in charge of appointments and renewals, to reappoint the same member of the court, once their membership has lapsed,

for an unlimited number of times up until that individual passes the age of 72.<sup>7</sup> Therefore, in theory, the term of office in Syria's Supreme Constitutional Court, according to the current law, if the individual was appointed at 40 years of age, could be renewed a total of seven consecutive times.

International standards, in contrast, guarantee that term of office is either secured until the judge reaches retirement age or until the completion of a non-renewable term. The United Nations Special Rapporteur on the Independence of Judges and Lawyers indicated the risks of 'temporary appointment', considering that this, and the lack of tenure security for judges, is one of the common practices affecting the term of judges, who are then at risk of unchecked dismissal or suspension.<sup>8</sup> The International Commission of Jurists concluded that, as per international standards, the tenure of judges should be lengthy, in order to protect their independence. The United Nations Human Rights Committee, meanwhile, gave the recommendation that governments 'revise [their] laws to ensure that judges' tenure is sufficiently long enough to ensure their independence.'<sup>9</sup>

In terms of international practices, we have found that the majority of constitutions and constitutional court laws stipulate granting constitutional court judges one long term of office, which is non-renewable. This is the case in Germany, for example, where judges in the Federal Constitutional Court hold a single 12-year term of office. In Turkey, likewise, the term of office is 12 years and non-renewable; and in Italy, Morocco, Tunisia, France, Portugal and Poland, membership is nine years non-renewable. The benefit of this is that such a period is lengthy enough for the court to be able to carry out long-term judicial business, making clear the major trends of its jurisprudence. In terms of the principle of non-renewal, the aim of this is to strengthen the independence of the judges before those who appointed them, to avoid any attempts of inducement or pressure in decision-making.<sup>10</sup>

In view of the above, Syria's current constitution appears to be lagging behind with regard to this matter, by adopting four-year terms which may be renewed. As outlined above, this could in theory equate to seven consecutive renewals, and could render judges wary of issuing provisions and conducting their duties in a way that displeases the executive, which has the sole authority to renew their terms.

## 2.5 Dismissal of Judges

The matter of judges' dismissal is closely linked to the court's independence and impar-

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7 Hasan Mustafa al-Bahri, *al-qaḍā' ad-dustūrī, dirāsah muqārinah*, First Edition 2017, p. 129

8 Report of the Special Rapporteur on the Independence of Judges and Lawyers, Human Rights Council, Eleventh Session, A/HRC/11/41-24 March 2009

9 International Commission of Jurists, *The Tunisian Draft Law on the Constitutional Court in light of international law and standards*, November 2015, p. 11

10 Jinan al-Imam, *Let's talk about the Constitutional Court*, Democracy Reporting International, Tunisia programme, March 2018, p. 30

tiality. The most significant risk to the court's independence comes from the threat of dismissal by those wishing to oust those judges whose positions do not comply with 'guidance' indicated to the court. This could heavily influence the judges' decision-making.

Initially, constitutional court judges were given immunity from dismissal, beginning with the 1950 Constitution and similar provisions written into later constitutions; however, they mostly affirmed this as a principle only, leaving interpretations and details to court laws. The 1950 Constitution provision read as follows: 'A member of the Supreme Court may not be removed except by a decision agreed upon by four or more of its members.' The 1962 Constitution replicated this provision verbatim, while the 1973 Constitution stipulated that 'Members of the Supreme Constitutional Court may not be dismissed except as per the provisions of the law.'

The 2012 Constitution affirmed the principle that 'Members of the Supreme Constitutional Court may not be dismissed except in accordance with the law.' The 2014 Court Law made clear that judges may not be dismissed except by a reasoned decision by the court's general authority, and only in particular cases, these being: 'If a judge no longer meets the conditions of membership; if a judge is implicated in a matter which undermines their status or integrity, or in cases of a serious breach of duties or requirements of the job.' In these cases, the decision of the court to remove the member is relayed to the President. The 2014 Court Law, unlike previous court laws, does not include the inadmissibility of the court president or one of the judges being put on mandatory retirement, being transferred out of the court, or being commissioned to non-judicial roles. The absence of this provision implies the permissibility of these actions.

In terms of international standards on this matter, we can look to the following taken from the UN Basic Principles on the Independence of the Judiciary: 'Judges shall be subject to suspension or removal only for reasons of incapacity or behaviour that renders them unfit to discharge their duties.'<sup>11</sup> International standards also make clear that any allegation of misconduct by a judge must be subject to an independent, neutral and thorough investigation, and as part of a fair and impartial process before an independent, neutral and competent authority, in which the rights of the judge must be respected. The complaints proceedings against the judges and the disciplinary proceedings which include dismissal must be defined in law.<sup>12</sup>

In terms of other countries' constitutions, the most favourable option is to be found where details and guarantees regarding immunity from dismissal or impeachment are presented within the constitution itself rather than in court laws, since these can be easily changed or replaced. An example is the Ukrainian constitution, which stipulates that the authority of a judge of Ukraine's Constitutional Court may only be terminated in the following cases:

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11 UN Basic Principles on the Independence of the Judiciary, Principle 18

12 Council of Europe Committee of Ministers Recommendation (2010), as cited in: International Commission of Jurists, *The Tunisian Draft Law on the Constitutional Court in light of International Law and Standards*, p.9

1) termination of the term of his or her office; 2) his or her attainment of the age of seventy; 3) termination of Ukraine's citizenship or acquiring by him or her the citizenship of another state; 4) taking effect of a court's decision on recognition of him or her missing or declaration of him or her dead, or on recognition to be legally incapable or partially legally incapable; 5) taking effect of a guilty verdict against him or her for committing a crime; 6) death of a judge of the Constitutional Court of Ukraine.

In terms of the dismissal of a judge from Ukraine's Constitutional Court, the grounds are laid out in the constitution as follows:

1) inability to exercise his or her authority for health reasons; 2) violation by him or her of incompatibility requirements; 3) commission by him or her of a serious disciplinary offence, flagrant or permanent disregard of his or her duties which are incompatible with the status of judge of the Court or has proved non-conformity with being in the office; 4) submission by a judge of statement of resignation or of voluntary dismissal from office.

Returning to the Syrian context, it is clear that the international standards do not only necessitate the principle of irremovability, except in precise, exhaustive and defined cases, but also necessitate the presence of precise procedural guarantees in cases of dismissal if the requirements for this were met according to the provisions of the law. These, too, are absent from Syrian law. What is concerning in the current court law is the deletion of half of the article, that which was present in the previous court law, which had affirmed that 'neither the court president nor court members may be put on mandatory retirement, be transferred out of the court, or be commissioned to non-judicial roles.'

The following table outlines the changes that have affected Syria’s Supreme Constitutional Court over its history, regarding the number of judges, selection mechanisms, term of office, and renewability of terms.

	Number of Judges	Appointment Mechanism	Term of Office	Renewability of Term
1920 Draft Constitution	16	The Senate and the Courts of Cassation return eight judges each, selecting from their respective members by drawing lots.	-	-
1930 Constitution	15	Parliament elects eight members from within its ranks. The other seven are serving judges, selected as per judicial hierarchy or time served in the post.	-	-
1950 Constitution	7	Members are elected by Parliament from a list containing 14 names, drawn up by the President of the Republic	5 years	Yes
1953 Constitution	7	Members are elected by Parliament from a list drawn up by the President of the Republic	5 years	Yes
1962 Constitution	7	Members are elected by Parliament from a list containing 14 names, drawn up by the President of the Republic	5 years	Yes
1973 Constitution	5	Appointed by the President of the Republic	4 years	Yes
2012 Constitution	At least 7, currently 11	Appointed by the President of the Republic	4 years	Yes

This next table shows a comparison between different constitutional courts, looking at the number of judges, appointing authority, term of office and renewability.

	Number of Judges	Appointing Authority	Term of Office	Renewability of Term
Syria	At least 7, currently 11	President of the Republic	4 years	Yes
Tunisia	12	The President of the Republic, the Assembly of the Representatives of the People, and the Supreme Judicial Council each appoint four members	9 years	No
Morocco	12	Six members are designated by the King, of which one member is proposed by the Secretary General of the Superior Council of the Ulema, and six members are elected, half by the Chamber of Representatives and half by the Chamber of Councillors	9 years	No
France	9, plus former Presidents of the Republic	Three of its members are appointed by the President of the Republic, three by the President of the National Assembly and three by the President of the Senate	9 years	No
Germany	Two chambers, each containing 8 members	Half the members of the Federal Constitutional Court are elected by the Bundestag and half by the Bundesrat	12 years	No
Spain	12	Four members are nominated by Congress, four by the Senate, two are nominated by the Government, and two by the General Council of the Judicial Power	9 years	No
Portugal	13	Ten are appointed by the Assembly of the Republic and three co-opted by those ten	9 years	No



### 3 Jurisdiction of the Court and Access to the Court

There is no doubt that the absence of a constitutional court indicates a significant shortcoming in a country's legal system. The lack of a body that guarantees the compliance of laws in their wider sense, and all other practices attributed to state authority, with the constitution, would leave the door open for severe violations and infringements. It would erode the value and meaning of the country's constitution and wholly undermine the principles of legitimacy and citizenship. Yet what is worse still, perhaps, is when such an entity exists, but its capacity to function is paralysed to such an extent that it exists in name only, either by it being granted powers too meagre to be meaningful, or by access to it being restricted. In Syria, this has reached such an extent that the Syrian people doubt whether a constitutional court exists at all, despite it having been established decades ago.

It is here that the importance of analysing the jurisdiction of the constitutional court, and the way it is accessed, comes to the fore. The aim of this is to:

- Review the extent to which Syria's constitutional court enjoys the powers which allow it to effectively perform the role expected from it.
- Reveal the extent to which it is possible to access the court by identifying the people or entities which have recourse to this court and may activate its jurisdiction.
- Identify whether the court is able to exercise its assigned powers in a compulsory manner,<sup>13</sup> or whether they rest on the discretion of particular entities, as authorised by the relevant legal system.

This section will outline the court's jurisdiction as outlined in previous Syrian constitutions, before looking at the jurisdiction stipulated in the current constitution. We will then compare this to international practices, by which, and upon whose basis, the system of the The Syrian Constitutional Court may be evaluated. We will then put forward ideas and proposals for activating the authority this court and enhancing its capacities.

#### 3.1 Syria's Constitutions Prior to 2012

A review of Syria's past constitutions reveals significant development in the constitutional court in terms of its jurisdiction and responsibilities. At the start, these were limited to prosecuting powers, as per the draft constitution of 1920, and the constitution introduced in 1930. Constitutional control was introduced with the 1950 Constitution, which is the constitution credited with effectively introducing the principle of constitutional judiciary to Syria's legal system. The court's powers continued to develop from then on, up to its current manifestation.

As per the **1920 Constitution**, the jurisdiction of this court (which did not materialise

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<sup>13</sup> What is meant by 'compulsory' here is not the binding nature of a ruling, interpretation or consultative opinion given by the court, but rather the extent to which it is compulsory that an issue is raised before the court.

because the constitution did not enter into force) was only to prosecute. It was granted the authority to put ministers, and members of the Senate and Parliament on trial, and the Chamber of Audit's president and members. In the **1930 Constitution**, the court was given the authority to put on trial the President of the Republic and ministers only.<sup>14</sup>

In the **1950 Constitution**, the jurisdiction of the Supreme Court was the subject of extensive debate during the meetings of the Constituent Assembly, whose role it was to draft the constitution's provisions. The discussions culminated in the court being granted the constitutional control authority and prosecuting powers, as well as the authority to arbitrate on electoral disputes.

This constitution included multiple forms of constitutional control, whereby the court reviewed the constitutionality of laws, and the constitutionality and legality of draft decrees, and ruled on the administrative acts, decisions and decrees found to be in violation of the constitution, law or regulatory decrees.

In terms of its prosecuting powers, in view of the recognition and respect demanded of the office of the presidency, and in view of the seriousness of the governing responsibilities of ministers, the writers of the constitution decided to insert certain provisions relating to the prosecution of those who held these offices. This power was to be granted to the Supreme Court, and would be within conditions set by a special law. In addition to this, it would be able to pass binding rulings on electoral disputes.

Controversy and division over this issue was avoided in the drafting of the **1953 Constitution**, with the Supreme Court continuing to enjoy constitutional control and prosecution powers, as well as ruling in electoral disputes.

The **1962 Constitution** reproduced many of the provisions and rules decided on in the 1950 Constitution, with some amendments in line with the country's new political and military situation. In terms of constitutional control, this was limited to ruling on the constitutionality of laws and draft decrees. This constitution, however, deprived individuals of recourse to the constitutional court, even in an indirect way, something which had been allowed in the 1950 and 1953 constitutions. It also removed the court's jurisdiction over electoral disputes. The court was, however, granted powers to prosecute the President, who was answerable for violation of the constitution, high treason, and ordinary crimes. This court also considered and ruled conclusively in the prosecution of ministers.

Having been absent for a number of intervening temporary constitutions, the constitutional court was reintroduced in the **1973 Constitution**. This constitution approved the principle of constitutional control and brought in the term 'Constitutional Court' rather than 'Supreme Court'. It also amended some of the court's responsibilities and powers; its constitutional control extended only to the constitutionality of laws that were yet to be

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<sup>14</sup> Umayma Hassan, *al-maḥkamah al-'ulyah fī sūriyah*, academic paper supervised by Dr. Fouad Shubat, Syrian University Law Faculty, 1954, p.4

passed, and to legislative decrees. As with the 1962 Constitution, there was also no option for individuals to resort to the court, in contrast to the two constitutions of 1950 and 1953. In terms of prosecution powers, the 1973 Constitution limited these to the capacity to try the President only, without this extending to ministers. It should be noted that, according to these provisions, the President was not answerable for actions performed in an official capacity, except in the case of high treason. In terms of electoral disputes, the court was given the power to investigate appeals relating to the validity of parliamentary elections; however, its role was limited to carrying out investigations and referring the results back to Parliament, in whose power it was to rule on the appeal of the validity of the membership of its own members in light of the court's investigation, something which was the subject of much criticism.<sup>15</sup> The 1973 Constitution also stipulated, for the first time, consultative jurisdiction, whereby the constitutional court would give an opinion, upon the request of the President, on the constitutionality of draft laws and legislative decrees, and the legality of draft decrees.

### 3.2 Syria's Current Constitution of 2012

Syria's current constitution was adopted in 2012, seemingly in response to popular demands which were first voiced in 2011. Among these demands were the establishment of the rule of law and the values of citizenship, the strengthening of accountability, and the safeguarding of justice and equality for all citizens. All these demands are those which are assumed to be at the core, whether directly or indirectly, of the work of the constitutional court, to which the new legislation afforded numerous powers, some of which had not been stipulated in any previous Syrian constitution. These new powers are as follows:

- **Constitutional control** – The current Supreme Constitutional Court has jurisdiction in various forms, including the following:
  - Reviewing the constitutionality of laws referred to the court, in cases where the President, or a fifth of parliament, take exception to the constitutionality of a law before being passed.
  - Reviewing the constitutionality of legislative decrees, in cases where a fifth of parliament take exception to their constitutionality within fifteen days of being presented to parliament.
  - Reviewing the constitutionality of regulations and systems, as practised by the court, on the basis of the opposition of a fifth of the members of parliament.
  - Considering claims of the unconstitutionality of a law. The 2012 Constitution adopted a particular mechanism for individuals to indirectly access the court,<sup>16</sup> stipulating the following:

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<sup>15</sup> For further details see: Hasan al-Bahri, *al-faṣl fī at-tu'ūn al-khāṣa bi-ṣaḥḥat intikhāb a'dā' majlis ash-sha'ab as-sūrī*, Comparative analytical research, Syrian Arab Republic, Ministry of Justice, Law Journal First Issue, Section Two 2012, p. 197 and onwards

<sup>16</sup> Jamila al-Sharbaji, *daur al-maḥkamah ad-dustūrīyah al-'ulyah fī ar-raqābah 'ala dustūrīyat al-qawānīn fī al-jamhūrīyah al-'arabīyah as-sūrīyah bayn dustūrayy 1973 wa 2012*, p. 132

The Supreme Constitutional Court is charged with considering challenges made to the constitutionality of laws and ruling upon them, as follows: if a claimant making a challenge claimed that the court was applying an unconstitutional legal text in formulating its ruling, and if the court considering the challenge found that the claim was serious and should be ruled on, it should halt the proceedings of the case and refer it to the Supreme Constitutional Court; the Supreme Constitutional Court should then rule on the claim within 30 days of its entry into the Register.

This means that the possibility of individuals appealing the unconstitutionality of a law is conditional on there being a case pending before the judiciary. Then, once a ruling is made, one of the parties may appeal this ruling if they oppose it, in accordance with the relevant procedures. This appeal is then lodged before a higher court than that which passed the initial ruling, known as the courts of second instance; it is before this court that the individual opposing a particular ruling appeals the unconstitutionality of the law as applied by the court of first instance. This means that the appellant claims that the law which was applied was in violation and contradiction of the constitution's provisions. In such cases, if the court of second instance which is considering the appeal is convinced that these claims over the unconstitutionality of the law are serious and valid, it has the right to decide to refer the matter to the Supreme Constitutional Court, which will then rule on the constitutionality of the appealed law. This ruling must be given within thirty days of it being recorded.

The implications of this mechanism are as follows:

- Individuals are deprived of the right of direct recourse to the constitutional court, since this can only happen from the courts of second instance.
- The constitutional court is itself deprived of the right to consider such claims of its own accord, given that there has to be a claim and appeal as per the above mechanism; as such, even though the constitutional court rules on the unconstitutionality of a law, it cannot address it of its own accord in order to rule on this issue.
- Ordinary citizens and legal persons, such as organisations and trade unions, who are not already part of an existing claim before a court of first instance, are deprived of recourse to the constitutional court. This is because the constitution and the court law only grant this right to the person known as a 'litigant', namely a party in a case. As a result, women's rights organisations, for example, will not be able to appeal the unconstitutionality of the Syrian nationality law over its provisions which discriminate against women, unless they are a litigant and party in an existing case pending before the judiciary.
- **Penal jurisdiction** – The constitutional court has a mandate to bring the President to trial, in cases of high treason only. The principle criticism made of this provision is that 'high treason' is itself not a crime that exists in Syria's penal code.
- **Jurisdiction related to electoral and candidacy matters** – The 2012 Constitution expanded the jurisdiction of the constitutional court to extend beyond the consideration of election appeals, as it had in previous constitutions, to include overseeing the presidential election process as a whole. This was after

presidential elections were introduced into the 2012 Constitution, replacing the referendums that had been adopted in a number of previous constitutions. The court, as such, came to carry out the following roles: considering appeals on the validity of presidential elections and parliamentary elections; overseeing the presidential election process; and considering cases where either the President or members of parliament lack any of their candidacy conditions.

- **Consultative jurisdiction** – the Supreme Constitutional Court has the mandate to give constitutional and legal counsel to both the President and Parliament. It also has the mandate to interpret the constitution's provisions upon request by the President of the Republic or the Speaker of Parliament.

Below is a table clarifying the court’s jurisdiction in terms of constitutional control (or review), and giving consultative opinions and constitutional interpretation. These three elements, the original jurisdiction of a constitutional court, have been focused on, while electoral and prosecution roles have been excluded.

Jurisdiction	Who Has Recourse to the Court	Nature of Jurisdiction
Reviewing the constitutionality of laws	The President of the Republic or a fifth of Parliament	Discretionary, activated upon request
Reviewing the constitutionality of legislative decrees	A fifth of Parliament	Discretionary, activated upon request
Reviewing the constitutionality of regulations and systems	A fifth of Parliament	Discretionary, activated upon request
Appraising the constitutionality of draft laws and legislative decrees, and the legality of draft decrees	The President of the Republic	Discretionary, activated upon request
Appraising the constitutionality of legislative proposals	The Speaker of Parliament	Discretionary, activated upon request
Ruling on claims referred from courts in appeals over the unconstitutionality of a legal provision	Litigants in appeal claims	Discretionary, activated upon the litigant raising the objection; this is conditional and is subject to the discretionary power of the appeal court
Interpreting constitutional provisions	The President of the Republic, the Speaker of Parliament, or the Prime Minister	Discretionary, activated upon request

Upon reviewing the above table, several observations can be made:

**First:** The constitutional court does not have compulsory jurisdiction in any of the areas outlined in the table; it is petitioned and its role activated ‘upon request’. Discretionary power rests with the party which has recourse to the court, which could decide not to exercise this right at all, in which case the constitutional court and its authority would not be activated at all.

**Second:** The possibility of recourse to the constitutional court, in terms of constitutional control and with the exception of electoral disputes, is limited to official parties only (the President of the Republic, the Speaker of Parliament, the Prime Minister, a fifth of the members of parliament). The only case in which ordinary individuals have the right of recourse to the court – and even then, only indirectly – is by raising a constitutional challenge in an appeal in an ongoing dispute, with precise, strict conditions in place. Private and legal persons that are not litigants and do not have particular status or interest in an

ongoing case do not have this right.

**Third:** The Speaker of Parliament and the Prime Minister, along with a fifth of the members of parliament, have the right of recourse to the constitutional court to activate its constitutional review jurisdiction, or to request its consultative opinion or analysis of constitutional provisions. However, a review of the court's rulings announced since the introduction of the 2012 Constitution shows that those parties have not resorted to the court at all. Recourse to the court was limited to the President and ordinary citizens, in the limited set of circumstances that the law and constitution allow for. This raises questions about the reason for these parties' reluctance to use the constitutional court and exercise the license allowed them by the legal system pertaining to the court.

### 3.3 Gaps in Jurisdiction Compared to International Standards and Practices

Based on the above analysis of the jurisdiction of Syria's Supreme Constitutional Court, which currently operates according to the 2012 Constitution and the 2014 Court Law, and upon a review of the jurisdiction of constitutional courts in countries around the world, as well as jurisprudential arguments and efforts put forward in this area, we can point out a number of shortcomings and gaps in the current model of jurisdiction in Syria's court. Possible steps that could fill these gaps are as follows:

1. **Extending the Constitutional Court's scope of compulsory jurisdiction:** As demonstrated above, the jurisdiction of Syria's constitutional court in cases related to constitutional control as a whole, constitutional interpretation, and giving consultative opinions, is discretionary and non-compulsory. This means that it is not obligatory to petition the court, and instead discretion lies with the authority who was granted, by the constitution or court law, the right of recourse with the court. This has led to a paralysis of the capacity of the court to exercise its primary jurisdiction, which is effective constitutional control. It is not able to do so except 'upon request', this term having been used excessively in the court law and linked to every core competence of the court. As such, unless it is requested, the constitutional court, in actual fact, will not exercise real constitutional control, with the exception of its 'seasonal' jurisdiction regarding electoral appeals and its theoretical jurisdiction in criminal cases.

Even more dangerous than the constitutional court not exercising its full capacity, is the fact that there are many laws and decrees which may be introduced and applied, but which actually contravene constitutional provisions, and should legally be declared null and void.

In many countries around the world, constitutions and constitutional court laws grant such courts compulsory jurisdiction, where there are legal actions whose procedures of completion and implementation cannot be concluded until it has passed, necessarily, through the constitutional court; the court exercises its review powers in order to affirm that its contents are consistent with the constitution's provisions, which comprise the country's highest law.

Based on the above, the mechanism by which Syria's constitutional court exercises its jurisdiction must be amended; some of its powers should become compulsory, or the court should be granted the right to address, of its own accord and without a case or appeal brought, laws deemed to be in contravention of the constitution.

2. **Granting the Constitutional Court review powers over the declaration and prolongation of a state of emergency:** Syrian law permits 'the declaration of a state of emergency in the case of war, or a situation threatening its outbreak, or the security or public order in the Republic's territory or any part of it being threatened because of internal strife or general catastrophe, with the state of emergency including the whole or part of Syria's territory.'<sup>17</sup> Under the state of emergency, the executive enjoys, as per Syrian law, wide-reaching powers which restrict many constitutional rights. Syria was subject to the provisions of this exceptional state for almost 50 years; a state of emergency was declared under Law 2, issued by the National Command for the Revolutionary Council on March 8, 1963, and was officially ended under Legislative Decree 161 issued by the President on 21 April 2011.

Despite the significance of the exceptional powers enjoyed by the de facto ruler during the state of emergency – which restrict the majority of rights stipulated by the constitution – Syria's 2012 Constitution contains only brief mention of the state of emergency, and overlooks any role the constitutional court might play during this time.

This is in contrast to many constitutions across the world which give constitutional courts an important and impactful role for the declaration and prolongation of a state of emergency. This facilitates the reconciling of, on the one hand, the state's duty to protect its public, and, on the other, the individual interests and the rights of citizens and residents. It also ensures that the state of emergency is only introduced according to strict necessity and within specific limits, so that the executive does not exercise tyranny, or use the state of emergency as a pretext for an unjustified violation of individuals' rights or for an unwarranted extension of the state of emergency.

Accordingly, it is necessary that the jurisdiction of Syria's constitutional court comes to include constitutional control regarding the state of emergency, to rule on whether or not

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<sup>17</sup> Syria's Emergency Law, issued by Decree 51 on 22/12/1962



the requirements to introduce it, or prolong it, are met. Its requirements would be equal to comparable jurisdiction enjoyed by other constitutional courts.

- 3. Granting the Constitutional Court review powers over amending the constitution:** Constitutional courts in many countries across the world play a key role in the process of amending the constitution. Some constitutions, such as that of Morocco, allow the court to rule on the validity of the process of reviewing the constitution and declaring the outcomes of such. Others, such as the Turkish constitution, give the constitutional court the power to review the validity of the constitutional amendments in terms of form. A third group, which includes Bolivia, grants the constitutional court the power to rule in the constitutionality of the proceedings in the amendment of the constitution. Others give still wider powers to the court, such as in Tunisia, where the constitutional court exercises constitutional control with regard to the amendment process and the contents of these amendments.<sup>18</sup>

In Syria, the constitutional court is wholly removed from this process, whether through the provisions of the constitution or through the court law. This, in our view, is a significant shortcoming, and it is hoped that this will be resolved in any upcoming constitutional process. Granting the constitutional court the jurisdiction to observe and rule on the constitutionality of amendments is considered an additional guarantee to prevent single-sided or rushed amendments which would damage this key, critical process. This is particularly important because the Syrian constitution has in fact greatly facilitated the amendment process; the executive and legislature have sole authority, without there being any need to submit it to a popular referendum, in a process which is highly similar to the amendment or drafting of regular legislation. This is despite the fact that constitutional provisions are supposed to have power and significance which afford permanence and immunity.

Therefore, it would be appropriate to widen the powers of the The Syrian Constitutional Court, and grant it the jurisdiction to rule on the constitutionality of constitutional amendments, in full, both in form and content.

- 4. Overcoming the obstacles and restrictions which impede individuals' access to the Constitutional Court:** As has been indicated above, the 2012 Constitution, as per all of Syria's preceding constitutions, did not allow individuals direct access to the constitutional court. The 2012 Constitution instead introduced an indirect mechanism for individuals to access the court, namely through bringing a claim over the unconstitutionality of a law, with several conditions restricting this process. While certain limits and conditions might be logical in principle to regulate accessibility, others are deemed ex-

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<sup>18</sup> Report on the Tunisian Constitutional Court: *taḥlīl malāmiḥ al-mu'assasah ba'd ṣudūr al-qānūn al-asāsī*, 3 December 2015, Democracy Reporting International, Tunisia programme, p. 11

cessive; one such condition is restricting unconstitutionality claims to appeal cases only, not allowing them to begin in the courts of first instance, and likewise granting the courts of second instance exclusive and absolute authority to vet the claims and determine which get referred to the constitutional court. In countries such as Morocco and Tunisia, while similar conditions are in place to regulate individuals' direct access to the constitutional court, unconstitutionality claims are allowed to be put to all courts, including those of the first instance, unlike in Syria. In Morocco, the Court of Cassation is in charge of vetting which appeals are referred to the constitutional court. In Tunisia, referral is mandatory, and it is the constitutional court itself which decides which claims merit consideration, without the judges of other courts being given the discretionary and arbitration power.<sup>19</sup>

It is necessary that Syria considers reducing the restrictions and conditions limiting indirect access of individuals to the The Syrian Constitutional Court, so that they can present unconstitutionality appeals to first instance courts, as is the case in countries such as Morocco and Tunisia. Equally, more flexible controls should be put in place to prevent courts from holding absolute discretion over the referral of these claims to the constitutional court. Lastly, it is necessary for individuals to be given the possibility to directly access the constitutional court, with this right extending to civil society organisations which work in conflict resolution relating to public interest.

- 5. Granting the Constitutional Court review powers in the process of referendums and any resulting laws:** Referendums are considered one of the most prominent manifestations of direct democracy, and as the true embodiment of popular sovereignty. Given the significance of this process, most constitutions around the world pay special attention to the issue of referendums, as evidenced by granting constitutional courts a key role in overseeing this process and supervising the course of the referendum, whether in form, content, or both.

However, the Syrian constitution both renders the constitutional court absent from the referendum process as a whole, and limits the court's primary jurisdiction, by excluding particular kinds of laws from its constitutional review remit.<sup>20</sup>

The constitutional court is wholly overlooked in all the provisions relating to referendums, both in the 2012 Constitution and in the 2014 Election Law, which governs referendums.

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19 Report on the Tunisian Constitutional Court: *taḥlīl malāmiḥ al-mu'assasah ba'd ṣudūr al-qānūn al-asāsī*, 3 December 2015, Democracy Reporting International, Tunisia programme, p. 13

20 Hasan Mustafa al-Bahri, *al-qaḍā' ad-dustūrī, dirāsah muqārinah*, p. 165

Not only did the constitution exclude the constitutional court from this process and not include supervision of referendums within its jurisdiction, it also partially deprived the constitutional court of one of its most important responsibilities: reviewing the constitutionality of laws. For the constitution stipulates: 'The Supreme Constitutional Court shall not consider the constitutionality of the laws which the President of the Republic puts to a referendum and which obtain the approval of the people.' This provision has been the subject of significant criticism.

In view of the critical nature of the referendum process and the significance of the results derived from them, which the law grants 'an authority higher than any other', it is necessary that the referendum process is subjected to the review and supervision of the country's constitutional court, equal to the jurisdiction enjoyed by many other constitutional courts across the world. It is also necessary to remove the constitutional article depriving the court of its jurisdiction to review the constitutionality of laws put forward by the President for a popular referendum, given the risks inherent in this restriction and exclusion, and to grant of the constitutional court full jurisdiction to review the constitutionality of all kinds of laws without exclusion or exception.

- 6. Granting the Constitutional Court review powers in political party matters:** Political parties play a key and impactful role in the course of democratic states and societies. For this reason, many constitutions around the world entrust their constitutional courts with certain powers relating to these parties' affairs, allowing the court to issue rulings regulating the formation of parties and their activities in various ways. Germany, Turkey and South Korea, for example, are among the countries whose constitutions enable the constitutional court to regulate or even prohibit certain political parties, based on their policy platforms and internal party organisation.

Following a decades-long ban, Syria's 2012 Constitution is considered to have approved the principle of political pluralism in the country. However, the law regulating party affairs deferred all matters related to political parties to the Commission for Political Party Affairs, headed by the Minister for the Interior, and made the First Civil Court of Appeal in Damascus the exclusive and final judicial authority, excluding the constitutional court from this.

The powers of Syria's constitutional court should be widened in order for it to act as the legal authority pertaining to political party affairs. It alone should have the authority to rule in disputes related to party affairs – from licensing to disbandment and dissolution of parties – in line with the provisions of the constitution and parties law, which should be amended accordingly.

- 7. Granting the Constitutional Court review powers over the constitu-**

**tionality of international treaties:** Successive Syrian constitutions made no reference to international treaties, whether in their place in the national legal system, or in concluding international treaties which come into conflict with the provisions of the constitution itself.

Many constitutions around the world address the hypothetical of concluding international treaties which contradict the constitution's provisions, granting the constitutional court powers to exercise prior control in these cases. This is with the aim of determining the extent to which there is an actual contravention, and to determine the action required, whether to prevent ratification of said treaty or even to amend the constitution. In view of the significance of international treaties and the critical nature of the commitments and results which arise from them, it will also be appropriate to expand the powers of Syria's constitutional court to grant it compulsory prior review over international treaties, specifically those which the constitution necessitates are presented before Parliament to be ratified.

- 8. Granting the Constitutional Court powers to resolve conflicts between the state's powers:** Successive Syrian constitutions did not touch upon the creation of a constitutional mechanism to resolve conflicts that could arise between the different branches of power in the state, which could arise from conflicting mandates, jurisdiction and working mechanisms. It should be clarified here that the overlooking of this issue does not mean that such conflicts do not exist or arise; such conflicts are normal, and occur in many countries around the world. However, without a clear mechanism, these are often resolved with the most powerful authority imposing its will, and imposing its interpretation of provisions, powers or the constitution itself, regardless of the legality and legitimacy of such actions.

It is here that the importance of the constitutional court's potential role becomes clear, given that it is the body responsible for determining the constitutionality of laws and government actions, and upholding the rule of law. It could provide a platform for resolving conflicts, which are liable to occur in any constitutional democracy, between different branches of government, authorities and officials.<sup>21</sup>

Morocco's constitution, for example, assigned the country's constitutional court the power to rule in disputes between the government and parliament; in Tunisia, the constitutional court has the power to resolve conflicts relating to the jurisdiction of the President and the Prime Minister.<sup>22</sup> In Spain, the constitutional court enjoys the power to consider 'con-

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21 See: European Commission for Democracy through Law, *Decisions of Constitutional Courts and Equivalent Bodies and their Execution: Report adopted by the Commission at its 46th plenary meeting (Venice, 9-10 March 2001)*

22 Jinan al-Imam, *Let's talk about the Constitutional Court*, Democracy Reporting International, Tunisia programme, March 2018, p. 62

flicts of jurisdiction between the State and the Self-governing Communities or between the Self-governing Communities themselves.’ In Bolivia, the pluri-national constitutional court has the power to ‘resolve conflicts of jurisdiction and powers among the organs of popular power.’

A paragraph could be included in the Syrian constitution to grant the court the power to resolve conflicts relating to jurisdictions and powers, and interpretations of constitutional provisions, which could arise between the executive, the legislature and the judiciary, with access to the court in these cases being granted to any of the parties in the dispute.

## 4 Problems and Proposed Solutions

Thus far, we have charted the developments of Syria’s constitutional court up to the present day, examined it in comparison with constitutions across the world, and looked at the different international standards which should be adopted. In this section, we shall present considerations of the current status of the court, and look into ways in which it could be developed.

Among the major challenges facing future Syrian constitutional lawmakers is the development of the constitutional and legal system pertaining to the constitutional court, in such a way that it is able to meet the aims and perform the roles for which it was established. One of the biggest concerns is that some do not even see a significant need for the court to develop, whether in form or substance; such voices maintain that it is satisfactory that the court now at least exists, given in was absent in many previous constitutions of the country. They argue, moreover, that the current court exercises jurisdiction and powers it did not have under former Syrian constitutions, and that it is more developed than constitutional courts in some other Arab countries, some of which do not have such a court at all, or have one only as an embellishment to the constitutional and legal system without giving it any real role.

There is no doubt there is some truth to this: the The Syrian Constitutional Court is now an established entity, while it did not exist, either constitutionally or in practice, for many years during Syria’s modern history. It is also true that its current powers surpass those of its previous manifestations, and that it is considered relatively developed compared to some other Arab countries. However, it would be a mistake to use the worst cases as our benchmark for evaluation, in order to prove that a poor situation is, by comparison, a positive one. Instead, we should be comparing the Syrian situation to good examples and enlightened models which exist in many other countries, including a number of Arab countries. Such a comparison will make clear the disparities, and the need for amendment and development.

The following recommendations are intended to be put in the hands of Syrian constitutional lawmakers for any upcoming constitutional process, whether in the near or distant future. This is with the aim of helping them enable the constitutional court to carry out its

function, achieve its objectives, and win back the trust of citizens. With regard to this latter point, this should extend a renewed faith that there is an accessible authority through which recourse may be sought, in order to guarantee the respect of the constitution's provisions and all the principles it comprises: the values of citizenship, justice, and equality for all, men and women alike, without exception, exclusion or discrimination.

Based on all of the above, we can pinpoint the problematic issues currently facing the constitutional court, and present proposals for how to develop and amend it. The term 'amend' here is meant in terms of the author's proposals on the text of particular articles only. It does not aim to steer the overall constitutional model that Syrians must themselves choose for the country's future, whether through the drafting of a new constitution, or the amendment of the 2012 Constitution.

## 4.1 Independence of the Court

The first challenge is in regard to the court's independence, and how it can be protected from being indirectly influenced. This relates to the way the court is composed; the number of judges, the mechanism of their appointment, the conditions of membership, the term of office and possibility for renewal, and the capacity for dismissal, all affect the independence of the court. It is vital that the court and its judges are safeguarded from the possibility of acting in deference to an external authority: that which appointed them, and which has the power to renew their term, remove them, increase or decrease their number, and dismiss them.

### 1. Number of judges

Recommendation: Amending Article 141 of the Syrian constitution regarding the number of judges on the constitutional court, so that a specific number is mandated in the constitution, one which is not open to different interpretations or readings, avoiding phrases such as 'could', 'at least' or 'at most'. It is also preferable that an odd number of judges is chosen in these courts to avoid ties during voting.

### 2. Mechanism to appoint judges

Recommendation: Amending Article 141 of the 2012 Constitution, and Article 3 Paragraph A of the Constitutional Court Law of 2014, which are the articles specifying how judges are appointed, to adopt the following new mechanism:

- a) Establishing an independent, specialist body, the majority of which would be made up of judges chosen by their peers, which has the authority to give recommendations on candidates, women and men alike, for membership to the Supreme Constitutional Court, upon meeting particular objective standards.
- b) The establishment of such a body would respect the standards

of transparency, justice, equality and total non-discrimination and non-exclusion, and would be based on objective and transparent procedures and standards. It would include a genuinely diverse and balanced configuration, in which would be represented lawmakers, lawyers, academics and civil society representatives, and others from specific groups. Judges would make up the majority of the body to avoid political and other kinds of external interference.

- c) This body would commit to using objective standards, indicated above, to choose judges, while adopting other procedures to strengthen public trust in the integrity of the candidates; for example, public hearings could be held, in which citizens and non-governmental organisations and others from particular groups would have the opportunity to express concerns or support towards certain candidates.
- d) The executive, which would formally appoint the judges, would commit not to override or reject the recommendations of this body, except for in exceptional circumstances, relying on standards previously announced. These cases would require a specific procedure under which the executive would be obliged to provide a written justification for why they did not adhere to the recommendation of the independent body in selecting a recommended candidate. The public would also be given the chance to see this written justification, in order to further strengthen transparency and accountability in the processes of selection and appointment.

### 3. Conditions of Membership

Recommendation: Amending Article 149 of the 2012 Constitution, and Article 4 of the Constitutional Court Law of 2014 so that the following is observed:

- a) Stipulating, clearly and in detail, the conditions for being appointed to the court, as well as the duties of the judges, rather than laying out only general, broad principles, or deferring to other laws, in order to avoid different interpretations and readings.
- b) Including an additional condition for judges, so that a candidate for membership to the court may not have had a political party position, or been a candidate for a political party or coalition for presidential, legislative or local elections, during the five years prior to the appointment.
- c) Expressly stipulating in the constitution, and in court law, balanced representation for Syrian women, provisionally not going below 30%, rather than leaving this issue to the discretionary power of decision-makers and maintaining the limited share currently occupied by women.

**4. Term of Membership and Renewability** Recommendation: Amending Article 143 of the 2012 Constitution which includes the term of office and renewability, so that the constitution adopts international best practice, by stipulating a specific timeframe for membership to the court, capped at nine years, which is unrenovable. This would guarantee the protection of judges from being subjected to pressures or bargaining which could impact their capacity to perform their duties.

## **5. Dismissal of Judges**

Recommendation: Amending Article 144 of the 2012 Constitution, and Article 52 of the 2014 Constitutional Court Law so that the following is observed:

- a) Stipulating expressly in the constitution, and likewise in the constitutional court law, on the clear, precise and limited cases in which judges may be dismissed, without broad terminology, obscurity, or referral to other subsidiary legislation, while observing the guarantees stipulated in the subsequent recommended action (b).
- b) Stipulating expressly in the constitution, not only in the court law which is easily amendable, that the dismissal of members of the constitutional court shall be based on equitable procedures carried out by an impartial and independent body to guarantee the soundness of the procedures. This body would itself be made up of judges who would oversee sound and just procedures which safeguard the rights of the constitutional court members, namely in notification, legal advice, appealing evidence, presenting a defence, and in raising an appeal before a wholly independent and impartial body.
- c) Re-introducing the provision removed from the current court law which stipulates that 'neither the court president nor court members may be put on mandatory retirement, be reassigned outside the court staffing, or be commissioned to non-judicial roles.' This is in order to increase the safeguarding of the judges from exclusion or targeting, whether directly through a straight dismissal, or indirectly as per the above removed provision, which should be re-introduced.

## **4.2 Capacity of the Court to Exercise its Jurisdiction**

The second set of challenges facing the court is its restricted capacity to exercise its own, in any case limited, jurisdiction. Despite the fact that the 2012 Constitution grants the court a wider jurisdiction than in any previous manifestations of the constitution, many of these powers are discretionary and not compulsory, and their activation and practice depend on a request by the party designated this right as per the constitution and court law.

As outlined above, the constitutional court may not exercise its power to review the con-



stitutionality of laws except upon the request of the President or a fifth of the members of parliament. Likewise, it may not review the constitutionality of legislative decrees, or regulations and systems, except upon the request of a fifth of the members of parliament. Further to this, it may not rule in claims brought to the courts in an appeal over the unconstitutionality of a legal provision except by request of a litigant, and within conditions and discretion of the courts of second instance. Likewise, it may only give an opinion on the constitutionality of draft laws and legislative decrees or the legality of draft decrees, upon the request of the President, and may only give an opinion on the constitutionality of proposed laws upon the request of the Speaker of Parliament. Finally, it may not interpret constitutional provisions unless on the request of the President, the Speaker of Parliament or the Prime Minister.

In terms of its compulsory jurisdiction, it is in fact either 'seasonal', such as in electoral disputes, or pro forma, such as in its ability to try the President, since this is only permitted for a crime which does not exist in the Syrian penal code. This effectively paralyses the constitutional court; while it might be a powerful constitutional body in theory, in practice it is all but incapacitated, having been given numerous powers by the constitution on paper only.

A further concern is that ordinary people are not really aware of the court, or of the role it is supposed to perform. What is the use if women, and many men, feel that Syria's nationality law is unconstitutional, since it is plainly discriminatory against women, if they have no legal recourse and are unable to have it ruled unconstitutional by the constitutional court, because those entitled to ask its opinion or activate its jurisdiction did not do so? Those who want to hear its opinion and judgement in this matter cannot constitutionally access it. Indeed, ironically, the court is also unable to consider this matter of its own accord. Such a scenario applies to many other laws.

In this matter, our recommendations are as follows:

- a) Amending Article 146 of the 2012 Constitution, which includes the constitutional court jurisdiction, in order to guarantee compulsory jurisdiction for certain kinds of laws; for example, laws regulating fundamental rights, guaranteed by the constitution and assigned to the law to regulate their practice. Alternatively, this could consist of a group of laws which, because of their significance and sensitivity, must be first put before the constitutional court, including the elections law, parties law, nationality law, protest law, emergencies law, associations law and the acquisition law.
- b) Amending Article 154 of the constitution to increase the effectiveness of the constitutional court. This proposal is considered a long-term solution, yet if put into practice will be highly beneficial and impactful; it involves granting the constitutional court the jurisdic-

tion to activate the currently redundant constitutional provision, repeated in successive constitutions, which stipulates the necessity of amending the laws which are in contravention to the constitution. The provision in question is from Article 154 of the 2012 Constitution and reads as follows: 'The legislation in force and passed before approving this Constitution remain in force until they are amended in accordance with its provisions, provided that the amendment is done within a period of no longer than 3 years.' What is absent in this provision is an implementing mechanism to guarantee its activation, meaning that laws remain in force despite being in violation of the constitution. The way to activate this provision, and overcome this problem, is to grant the constitutional court powers to follow up on this commitment, by specifying which laws violate the constitution, demanding their amendment or terminating them. The constitutional court can carry out this commitment in one of two ways:

**First:** The court could review, of its own accord, all the laws which are in violation of the constitution and specify the irregularities, then demand the relevant bodies to amend certain provisions, or repeal the laws entirely.

**Second:** In order not to overload the court with the task outlined above, an opportunity could be given to the relevant authorities (legislative and executive) to repeal or amend the laws which are in violation of the constitution within a specified time period. After this point, any natural or legal person will have the right of recourse to the constitutional court to request that it intervenes to repeal or amend them. This would be able to occur without the conditions currently in force, such as that of there being an existing claim, or someone having particular status or interest. Rather, it would be considered that any citizen has an interest in repealing laws which are in violation of the constitution; being a citizen affords him or her the right to raise a grievance before the constitutional court to have such laws repealed or amended, thus fulfilling the constitutional obligation.

- c) Granting the constitutional court compulsory jurisdiction to consider certain actions whose addition to the court's jurisdiction will be proposed, namely:
- Reviewing the declaration of a state of emergency
  - Reviewing the amendment of the constitution
  - Reviewing the process of referendums and any resulting laws
  - Reviewing matters relating to political parties
  - Reviewing the constitutionality of international treaties
  - Ruling in conflicts between the state authorities

- d) Granting the constitutional court the right to, of its own accord and without a claim or appeal, address laws that are deemed to contravene the constitution.
- e) Granting the ordinary courts the right to refer to the constitutional court, of their own accord and in the course of its consideration over a particular case, any applicable legal rule which is deemed to be in violation of the constitution's provisions, without the matter resting on the claim of a litigant.

### 4.3 Ability of Individuals to Access the Court

One of the most prominent popular criticisms directed at Syria's constitutional court today is the lack of awareness of the court, because of an inability to access it and put forward complaints. In order to address this issue, we hereby present recommendations on a number of different matters:

- Overcoming the obstacles of indirect access to the constitutional court by individuals, through:
  - Allowing for unconstitutionality appeals to be heard before courts of first instance from the start, not only courts of second instance.
  - Removing absolute discretionary power from the court considering the claim (whether a court of first or second instance) in referring to the constitutional court. There are many options for how to filter claims that do not warrant referral; in Tunisia, for example, claims are compulsorily referred to the constitutional court, which itself then decides which cases to consider. Another option can be seen in Morocco, where the Court of Cassation is given the authority to refer individuals' claims of unconstitutionality to their constitutional court.
- Granting direct access to the constitutional court to natural and legal persons: Opportunity has to be given in Syria for individuals to directly access the constitutional court, with this right extending to civil society organisations. Of course, this mechanism would be regulated within reasonable and objective controls, such as those adopted in a number of countries which give individuals this access, and the opportunity to seek constitutional justice through this court. We thus recommend the following in this regard:
  - Granting individuals direct access in cases where constitutionally-guaranteed fundamental rights are violated, as per a function assigned to one of the state powers. In order not to overwhelm the court, this mechanism could be considered a means for extraordinary redress, whereby it would only be

accepted in the following cases:

- If all other means for legal redress had been exhausted by the person bringing it forward.
- If no other means for legal redress exists.
- If the matter relates to the violation of substantive rights which have constitutional significance, or to the realisation of fundamental rights. Here, the constitution could define what the substantive rights are for which an individual could resort to the constitutional court. It could also, for example, stipulate that violation of rights outlined in particular articles of the constitution grants individuals the possibility of resorting to the constitutional court.

#### 4.4 Consolidating Powers to Strengthen Constitutional Control

Here, the issue does not relate to a shortcoming in the drafting of provisions pertaining to the constitutional court, or to restrictions in referral or accessibility mechanisms. Rather, the issue here is the constitutional court being rendered totally incapable of exercising constitutional control over particular actions; these are actions, moreover, which should be at the core of its jurisdiction, since it has been entrusted with the respect of the constitution's provisions and safeguarding them from contravention. This incapacity thus undermines the contents of the constitution itself. The recommendations here are as follows:

- 1) In terms of control regarding the declaration and prolongation of a state of emergency:

Amending Article 103 of the 2012 Constitution, which includes the declaration of a state of emergency, to guarantee:

- Granting the constitutional court compulsory control powers over the constitutionality of declaring a state of emergency, i.e. the power to rule whether the necessary substantive and formal conditions of declaring a state of emergency are actually fulfilled.
- Granting the constitutional court compulsory control powers over the requirements for prolonging a state of emergency, i.e. the authority to re-affirm the existence of the conditions that necessitated the introduction of the state of emergency. If an extension is found to be necessary, the court must specify a limited time period; each time such a period comes to an end, the court must again exercise its control powers

and reconsider the conditions.

2) In terms of control regarding constitutional amendments:

Amending Article 150 of the 2012 Constitution, which includes the process of amending the constitution, to guarantee:

- Granting the The Syrian Constitutional Court compulsory jurisdiction to review the constitutionality of the process of amending the constitution fully, in both form and content.

3) In terms of control regarding referendums and their resulting laws:

Amending Article 116 of the 2012 Constitution, which is related to the process of referendums, as well as the articles relating to referendums in the General Elections Law 5/2014, to guarantee:

- Subjecting the process of referendums to the review and oversight of the constitutional court, to the same extent that many other constitutional courts enjoy.
- Extending the court's powers and jurisdiction to include receiving appeals related to the process, content and result of referendums, to the same extent as for elections.

Removing Article 148 from the 2012 Constitution, which renders the court unable to consider the constitutionality of laws which the President of the Republic puts to a popular referendum. Due to the risks inherent in this restriction, the constitutional court should have full jurisdiction to consider the constitutionality of all types of laws, without exclusion or exception.

4) In terms of granting the constitutional court control regarding the constitutionality of international treaties:

- Amending Article 146 of the 2012 Constitution, which defines the constitutional court's jurisdiction, so that a new paragraph is added to stipulate the granting of the court compulsory pre-review of international treaties which the constitution necessitates are presented before Parliament to be approved, as per Article 75, Paragraph 2.
- Amending Article 75 Paragraph 6 of the 2012 Constitution, and stipulating expressly that international treaties stipulated in this paragraph may not be approved by Parliament until they have first been presented to and approved by the constitutional court, to ensure they do not contravene the constitution's provisions.

5) In terms of control regarding political party matters:

- Amending Article 146 of the 2012 Constitution, which includes the definition of the court's jurisdiction, to add to it that the court rules decisively on the dissolution of political parties on the basis of unconstitutionality, and likewise on decisions relating to refusing licenses for political parties.
- Amending Legislative Decree 100/2011, which includes the Parties Law, to recognise the role of the constitutional court and clarify its jurisdiction in this matter.

## 5 Conclusion

This paper has presented a close examination of Syria's Supreme Constitutional Court, and the course it has charted over the past century, beginning from its early establishment as 'the Supreme Court' as per the draft constitution of 1920, up until the completion of this research in 2020. Over this period, the court has witnessed both progress and setbacks, perhaps the most significant setback being its complete absence from several constitutions, spanning a number of years, during which periods it had been deemed an unnecessary entity. This was seemingly rationalised by the extraordinary circumstances the country had been going through, and the adoption of temporary constitutions which focused on the so-called fundamentals and overlooked what was deemed 'superfluous' – a category which, it appears, included the existence of a constitutional court.

Such reasoning is flawed, since it is during these same exceptional national circumstances that such a court would naturally see its both the scope and the necessity of its role expand. This is in order to guarantee the respect of the constitution, exercise necessary constitutional control, and provide redress for individuals from unconstitutional practices or legislation which, rather than protecting the population, cause them harm.

The irony here is that attitudes toward Syria's constitutional court have served to diminish its role during opposing circumstances; during the so-called exceptional circumstances, it was seen an unnecessary accoutrement, far from being a national priority. And yet during 'ordinary' times, it was seen as having little purpose: affairs were running as they should, and opinion prevailed that there was no need to resort to such a court, that is if it had to exist at all. These conclusions reveal a short-sighted approach to the court and a somewhat narrow understanding of its role and value; such a mentality perceives the court as a burden, one that it would be better to be rid of entirely, or, if established, restricted by enough obstacles to ensure that it effectively has no role. Unfortunately, such was the situation in Syria for many years, spanning a number of different iterations of the country's constitution.

This paper has sought to put forward practical recommendations and proposals for each

gap and difficulty identified in relation to the Supreme Constitutional Court, aiming to present ideas and visions for future Syrian constitutional lawmakers. This is in the hope that, one day soon, Syria will have a constitutional court which all citizens can look upon to protect them, respect their constitution, and safeguard their rights to justice, citizenship and equality for all.